

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

THREE D, LLC, D/B/A TRIPLE PLAY SPORTS
BAR AND GRILLE

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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* Nos. 14-3284

* 14-3814

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* Board Case No.

* 34-CA-12915

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**MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR
PUBLICATION OF THE SUMMARY ORDER**

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

On October 21, 2015, a panel of this Court (Circuit Judges Straub, Parker, and Wesley) issued an unpublished summary order in the above-captioned case. The National Labor Relations Board (“the Board”), by its Deputy Associate General Counsel, hereby moves for publication of that summary order. Board counsel has contacted opposing counsel Melissa Scozzafava for Three D, LLC, d/b/a Triple Play Sports Bar and Grille (“Triple Play”), who indicated that Triple Play opposes this motion and intends to file a response. In support of its motion, the Board shows:

1. The Court’s summary order upheld the Board’s decision and order against Triple Play issued in *Three D, LLC, d/b/a Triple Play Sports Bar and*

Grille, 361 NLRB No. 31 (Aug. 22, 2014). In doing so, the Court enforced the Board’s findings that the Company committed multiple unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)). Foremost among those issues is the Court’s discussion of the Company’s discharge of two employees, Vincent Spinella and Jillian Sanzone, for protected concerted statements they made on Facebook.

2. The Court has encouraged federal administrative agencies, such as the Board, to request publication of an unpublished summary order when the agency views publication to be “in the public interest.” *Continental Stock Transfer and Trust Co. v. SEC*, 566 F.2d 373, 374 n.1 (2d Cir. 1977). The Court gives special weight to the agency’s request because the “administrative agency . . . is charged by law with certain responsibilities under the federal . . . laws and [its] interpretation [of those laws] . . . is entitled to great deference by the courts.” *Id.* Accordingly, the Court will publish a previously unpublished summary order when the agency “has moved for publication of the order so that it could be cited in the future” (*Notaro v. Luther*, 800 F.2d 290, 290 n.* (2d Cir. 1986)), and the Court is “persuaded that th[e] decision may have some precedential value.” *Guan v. Board of Immigration Appeals*, 345 F.3d 47, 48 n.1 (2d Cir. 2003). See *Nicole Rose Corp. v. Commissioner of Internal Revenue*, 320 F.3d 282, 283 n.2 (2d Cir. 2003); *Patrick v. SEC*, 19 F.3d 66, 67 n.1 (2d Cir. 1994).

3. The Board requests that the Court publish its summary order in this case because publication is in the public interest and the order has precedential value. The Court's order provides important clarification to the standards applicable to employee speech in the social media context. As the Court stated in distinguishing *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012), a workplace speech case, "accepting Triple Play's argument that *Starbucks* should apply because the Facebook discussion took place 'in the presence of customers' could lead to the undesirable result of chilling virtually all employee speech online." Slip op. at 7. The Court further concluded that the Board's analysis "accords with the reality of modern-day social media use." Slip op. at 8.

To date, this Court has not published any opinions under the NLRA regarding the contours of employee protected speech on social media. Accordingly, the Court's summary order will provide guidance to the public, labor community, and future litigants, and is of precedential value regarding employee statements that have the potential to be seen by customers on social media.

4. The Court's publication of the summary order containing those clarifications will also prevent the Board from having to expend additional resources in defending against the same or similar arguments raised in subsequent cases. Because this case involved protected concerted activity in the social media

context, an ever-expanding area of employee communications, the same or similar arguments are likely to be litigated in future cases.

WHEREFORE, the National Labor Relations Board respectfully requests that the Court publish the summary order issued in this case.

/s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

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Dated at Washington, DC

This 23rd day of October 2015

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the address listed below:

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/s/Linda Dreeben
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Dated at Washington, DC
this 23rd day of October, 2015